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FILED
JUL 27 2005
UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIAUNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

In re) Case No. 05-20802-A-7
STEPHEN JOSEPH GERBICH and) Docket Control No. None
NIKKI ANN GERBICH,) Date: Ex Parte
Debtors.) Time: Ex Parte

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MEMORANDUM

Henry Reimers, a certified public accountant, has mailed a letter to the court dated July 8, 2005. It was filed on July 11. The letter has been sent on behalf of E. Joe Graham, DDS, Inc., Pension Plan, an unsecured creditor in this chapter 7 case. The letter complains about the chapter 7 trustee's no-asset report. The court will grant no relief on the basis of this letter for the reasons explained below.

First, there is no indication that Mr. Reimers is an attorney. Only an attorney admitted to practice in this court may appear on behalf of another person. See Local Bankruptcy Rule 1001-1(c) and Local District Court Rule 83-180(b). A review of the attorney admission records of this district does not reveal that Mr. Reimers is a member of its bar.

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1 Second, the objection to the final report is untimely. On
2 May 9, 2005, the trustee's proposed final report and account was
3 filed. It indicates that no assets were administered by the
4 trustee. On that same day, notice of this "no-asset" report was
5 served on the debtors, the debtors' attorney, the trustee, the
6 United States Trustee, and all creditors, including the E. Joe
7 Graham, DDS, Inc., Pension Plan by service on the Henry Reimers
8 Accountancy Corporation. Service on Mr. Reimers's accountancy
9 corporation is consistent with the proof of claim filed on behalf
10 of the E. Joe Graham, DDS, Inc., Pension Plan.

11 The notice served directed parties in interest to file any
12 objections to the trustee's final report no later than June 8,
13 2005. If an objection was filed, the notice further directed the
14 objecting party to file a notice of hearing reflecting that the
15 objection would be resolved by the court on June 27, 2005 at 9:00
16 a.m.

17 No objection was filed by, or on behalf of, the E. Joe
18 Graham, DDS, Inc., Pension Plan prior to June 8, 2005. To the
19 extent the letter filed July 11 in an objection to the trustee's
20 report, it is not timely.

21 Fourth, and to the extent the letter asks the court
22 reconsider its approval of the trustee's report, that motion will
23 be denied. The letter essentially states that Mr. Reimers sent
24 his objection to the trustee's report to the trustee rather than
25 file it with the court. Indeed, such a letter was mailed to the
26 trustee on June 6, 2005. While it is perhaps understandable that
27 Mr. Reimers thought this satisfied the requirements explained in
28 the May 9 notice, it did not and had an attorney admitted to

1 practice in this court been consulted it is doubtful the error
2 would have been made.

3 Nonetheless, rather than simply dismiss the error as being
4 inexcusable neglect, the court has considered the substance of
5 the objection raised, both in the June 6 and July 11 letters.
6 The objection lacks merit.

7 Mr. Reimers argues that the debtors have the ability to
8 repay his clients loan from future income. To that end, Mr.
9 Reimers provides projections of the debtors' future income to
10 demonstrate their likely ability to repay the loan. This
11 argument has two problems.

12 On the one hand, this objection has nothing to do with the
13 trustee's report because a chapter 7 debtor's future income is
14 not property of the bankruptcy estate. See 11 U.S.C. §
15 541(a)(6). See, also In re Fitzsimmons, 725 F.2d 1208, 1210-11
16 (9th Cir. 1984). And, because the debtors' post-petition income
17 is not property of the estate, the trustee's report cannot be
18 faulted because it does not indicate that the trustee has
19 administered that income.

20 On the other hand, a chapter 7 petition may be dismissed if
21 it will result in a substantial abuse of chapter 7. See 11
22 U.S.C. § 707(b). Generally speaking, "the debtor's ability to
23 pay his debts when due as determined by his ability to fund a
24 Chapter 13 plan, is the primary factor to be considered in
25 determining whether granting relief would be a substantial abuse"
26 as that term is used in 11 U.S.C. § 707(b). In re Kelly, 841
27 F.2d 908, 914 (9th Cir. 1988).

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1 However, Mr. Reimers and his client cannot seek relief under
2 section 707(b). Standing to bring a motion to dismiss a chapter
3 7 petition under section 707(b) is limited to the United States
4 Trustee. See 11 U.S.C. § 707(b) ("on a motion by the United
5 States trustee, but not at the request or suggestion of any party
6 in interest, [the court] may dismiss a case . . . if granting
7 relief would be a substantial abuse of the provisions of this
8 chapter.") The United States Trustee has never sought to dismiss
9 the case.

10 Further, even if the United State Trustee was inclined to
11 now file a motion to dismiss under section 707(b), it would be
12 denied as untimely. Such a motion should have been filed no
13 later than the 60th day following the original setting of the
14 meeting of creditors. See Fed. R. Bankr. P. 1017(e)(1). In this
15 case, the meeting of creditors was first set on March 1, 2005.
16 Because the 60th day following March 1 fell on a Saturday, the
17 last day to file a section 707(b) dismissal motion was May 2.
18 See Fed. R. Bankr. P. 9006(a). No motion was filed by the United
19 States Trustee by this deadline (or at any other time).

20 Even if the court ignored the plain language of section
21 707(b) and accorded standing to Mr. Reimers and his client under
22 section 707(b) and construed both the June 6 letter to the
23 trustee and the July 11 letter to the court as motions to dismiss
24 the petition, both motions would be untimely.

25 The two letters from Mr. Reimers could also be interpreted
26 as requests that the debt owed to the E. Joe Graham, DDS, Inc.,
27 Pension Plan be excepted from the debtors' chapter 7 discharge on
28 the ground that Mr. Gerbich misrepresented his intention or

1 ability to repay the loan. See 11 U.S.C. § 523(a)(2).

2 The debtors' chapter 7 discharge was entered on May 13,
3 2005.

4 To object to the discharge of a particular debt, a complaint
5 had to be filed by the creditor no later May 2, 2005. See Fed.
6 R. Bankr. P. 4007(c). Notice of this deadline was served by the
7 court clerk on January 27, 2005. According to the proof of
8 service, notice was given Mr. Reimer's client care of his
9 professional accountancy corporation.

10 A review of the docket reveals that no complaints objecting
11 to the discharge of debts were filed on or before May 2 (or at
12 any other time). If the court were to construe the June 6 and
13 July 11 letters as complaints, they would be untimely.

14 In conclusion, the objection to the final report was
15 untimely, there is no good excuse for the failure to file a time,
16 and the objection lacks merit because it does not demonstrate
17 that the trustee failed to administer property of the estate.
18 Furthermore, to the extent the creditor seeks dismissal pursuant
19 to section 707(b), the creditor lacks standing to bring the
20 motion and, ignoring the lack of standing, the motion comes too
21 late as does any attempt to seek an exception to discharge on the
22 basis of fraud or some other intentional misconduct.

23 A separate order will be entered.

24 Dated: *27 July 2005*

25 By the Court

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28 Michael S. McManus, Chief Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CERTIFICATE OF MAILING

The undersigned deputy clerk in the office of the United States Bankruptcy Court for the Eastern District of California hereby certifies that a copy of the document to which this certificate is attached was mailed today to the following entities listed at the address shown on the attached list or shown below.

Hank Spacone
PO Box 255808
Sacramento, CA 95865-5808

C. Rector
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Sacramento, CA 95816

Henry J. Reimers, Jr., CPA
PO Box 1507
Yuba City, CA 95992-1507

Office of the US Trustee
501 I St, Ste 7-500
Sacramento, CA 95814

Dated: JUL 28 2005

Sarah P. Hall
Deputy Clerk

Deputy Clerk

Sarah Potter